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Hurricane Insurance Litigation: More Than Wind Versus Water

*Virginia Y. Trainor**

Hurricanes Katrina and Rita. So much has already been said of these devastating events, leaving one to wonder whether there is anything else to be said on the topic. Apparently, there is. Two years after Hurricanes Katrina and Rita, there is still a litany of litigation, with many remaining questions to be answered by our courts. This author predicts that the litigation will continue for quite some time. One can only hope the rebuilding on Louisiana and Mississippi's Gulf Coasts will be complete and its residents' lives fully restored well before this time.

The focus of this article is to review the rulings that have come down thus far on the property insurance issues related to these events and the unique procedural problems that hopefully will never again be seen. Many of the issues discussed in this article are—outside of the context of the hurricane litigation—merely of academic interest. As one of my esteemed partners has observed, the lessons learned today about property insurance law are reminiscent of those learned in security devices during and after the Great Depression. The lessons learned are indeed important and may clarify Louisiana property insurance law to a degree never before envisioned.

In many ways, this article is merely meant to be a picture in time of the current state of the law at the two year anniversary of these events. The landscape changes on an almost daily basis, causing some concern on the part of the author that this very article may be outdated before it is published. But again, that is the point—to see how far we have come—but also to see how very far we have to go before these issues become but another topic for law students on future bar exams.

I. THE GOVERNMENT INITIATIVES

Almost immediately after August 29, 2005, insureds and insurers alike faced certain obstacles concerning insurance claims. Insurance agents could not be located, insurance policies were destroyed, and residents and business owners could not even enter their cities, much less have their homes and businesses inspected by insurance adjusters. Thus, before the investigation of these claims could even begin, there was often a long delay in simply starting the process.

This unique situation led to certain acts by the Governor, the Louisiana Department of Insurance ("LDOI"), the Louisiana legislature, and our courts to try to relieve some of the pressure related to these unprecedented circumstances.

A. The Governor Acts

By September 6, 2005, Governor Blanco issued Executive Order KBB005-32, which suspended all deadlines applicable to legal proceedings, including prescription and peremption, in all Louisiana courts, administrative agencies, and boards until September 25, 2005. With the onslaught of Hurricane Rita and the continuing impact of Hurricane Katrina, the order was extended to October 25, 2005 and then again to November 25, 2007.

The order applied statewide and to all litigation and allowed attorneys and all involved in the legal field to focus on their families and recovery from the events, without ramification for failing to execute filings due during this time.

B. The Louisiana Department of Insurance ("LDOI")

Our Louisiana Legislature apparently had some forethought that a catastrophic event might one day befall our state. For a typical property loss, an insurer has fourteen days to initiate its claims investigation upon notice of a claim.¹ However, in the event of a catastrophic event, an insurer is given thirty days to initiate its investigation. Although the term "catastrophic" is not

1. LA. REV. STAT. ANN. § 22:658 (2007).

defined in the statute, one should be loathe to say that either of the two hurricanes was not a catastrophic event. Of course, the thirty days begins to run on the date of notice of an event from an insured, and as stated before, just giving notice to the insurer to start the process was an insurmountable task for some.

The LDOI took several steps during the days, weeks, and months immediately following the hurricanes to aid insureds, including:

- Emergency Rules 15, 17, 19 and 20: All insurers were prohibited from canceling policies for any reason, including non-payment of a premium for certain impacted parishes and types of policies. These provisions expired in late 2005 or early 2006, depending on the parish.
- Emergency Rule 22: Mandated that insurers form a mediation program to which insureds could voluntarily submit their homeowner disputes for resolution. As of the time of this writing, this rule is still in effect and in use and has been helpful in resolving many hurricane claims.
- Emergency Rule 23: Suspended the right of insurers to cancel or fail to renew policies insuring residential or commercial property with a hurricane claim until sixty days after repairs were complete, except under certain limited circumstances, as when the insured has failed to pay insurance premiums or committed fraud, or where the insured has stated that he will not be rebuilding the insured property. This provision expired December 31, 2006, thereby allowing insurers to begin issuing notices of cancellation and non-renewal beginning January 1, 2007.
- Directive 195: Extended the time for an insured to complete repairs to recover certain supplemental payments withheld by insurers until repairs are complete. This provision was revised several times, ultimately granting insureds up to two years from the date of the claim to complete repairs and obtain the supplemental payments. In contrast, the standard time in the typical property policy to recover these sums is 180 days (six months).² There is some debate as to whether “date of the claim” refers to the date the claim arose or when it was reported.

2. The typical property policy allows for recovery of “actual cash value,” or replacement cost less depreciation, until repairs are complete, after which the

- Directive 199: Requested insurers to voluntarily extend the time to file suit on claims related to these events from one year after the loss to two years after the loss. Most insurers voluntarily complied with this request.

C. The Louisiana Legislature

The Louisiana legislature followed upon the LDOI's Directive 199 with a statutory enactment extending the time to file suit for claims related to these events to two years and one day after the loss.³ The constitutionality of this action was challenged in the courts as was envisioned by the legislature.⁴ The Louisiana Attorney General brought a declaratory judgment action at the direction of the legislature against insurers seeking a ruling that the extension was constitutional.⁵ Certain insurers challenged the legislation on two main grounds: (1) that it violates the Contracts Clauses of the Louisiana and U.S. Constitutions by impairing the private contractual relationship between insurers and their policyholders; and (2) that it violates the Supremacy Clause of the

depreciation may be recovered if allowed by the policy and if the supplemental claim is timely made. The standard period for recovery of the depreciation is 180 days after the loss. ISO Forms HD 00 03 10 00; ISO CP 00 10 04 02.

3. 2006 La. Acts No. 802, § 2 provides uncodified legislation to establish an additional, limited exception to the running of prescription to August 30, 2007 for Hurricane Katrina claims and September 25, 2007 for Hurricane Rita claims. Interestingly, at the same time the Louisiana legislature extended the time to file suit to August 30, 2007 for Hurricane Katrina and September 25, 2007 for Hurricane Rita, the legislature passed a somewhat related measure stating that insureds could file claims with insurers (as opposed to suits) until September 1, 2007 and October 1, 2007 respectively. LA. REV. STAT. ANN. § 22:658.3 (2007). Thus, claims that may not have been reported by the deadline to file suit will have to be considered by the insurer, but the insured may have no recourse to sue for benefits under the policy.

Without a doubt, some insureds will miss the two year deadline and will seek to raise arguments such as *contra non valentem*. For a more thorough discussion of this issue, see Benjamin West Janke, *Revising Contra Non Valentem in Light of Hurricanes Katrina and Rita*, 68 LA. L. REV. 497, 540-45 (2008).

4. *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed to Do Bus. in State*, 937 So. 2d 313 (La. 2006).

5. *Id.* at 317.

U.S. Constitution because it attempts to regulate flood insurance, which is preempted by federal law, i.e., the National Flood Insurance Program.

The matter proceeded to the Louisiana Supreme Court on an expedited basis after the district court upheld the constitutionality of the statute.⁶ The Louisiana Supreme Court affirmed.⁷ The insurers argued that the legislation could not apply retroactively to prohibit insurers from pleading that claims filed after one year are time barred. However, the supreme court concluded that because the Louisiana insurance industry is “pervasively regulated” and because the former minimum period to bring suit was already set by Louisiana law, insurers had notice that a change was a legal possibility.⁸ The supreme court further reasoned that because the hurricanes created a statewide emergency and impacted hundreds of thousands of Louisiana citizens, including forced evacuation and displacement, the legislation had a significant and legitimate public purpose in protecting the rights of those citizens and their general welfare.⁹

The supreme court likewise rejected the contention that the legislation violated the Supremacy Clause of the U.S. Constitution concluding that the section of the legislation, which included “flood insurance polic[ies]” could be read to reference flood insurance policies “other than those issued pursuant to the federally-regulated insurance program.”¹⁰

In addition to extending the prescriptive period, the legislature amended one of Louisiana’s statutory provisions for bad faith, Louisiana Revised Statutes section 22:658, to increase the penalties from 25% to 50% of “the amount to be found due from the insurer” and, in the case of a partial tender, 50% of “the difference between the amount paid or tendered and the amount

6. *Id.*

7. *Id.*

8. *Id.* at 325.

9. *Id.* at 326.

10. In 2007, the Louisiana Legislature amended Louisiana Revised Statutes section 22:629 to mandate that property insurance policies allow for a two year period to file suit. 2007 La. Acts No. 43.

found to be due”—and to allow the recovery of reasonable attorney fees and costs.¹¹

Moreover, Louisiana Revised Statutes section 22:658.2 was enacted to prohibit a property insurer from using a floodwater mark on a covered structure or the fact that a structure is moved off of its foundation, without consideration of other evidence, to determine whether a loss is covered under a homeowner's insurance policy.¹² Perhaps more importantly, the provision puts the burden of proof on an insurer where “damage to immovable property is covered, in whole or in part, under the terms of the policy of insurance.”¹³ A violation of section 22:658.2 expressly allows an insured to recover damages under Louisiana Revised Statutes section 22:1220.

These amendments to the bad faith statutes went into effect on August 15, 2006, with no Legislative statement as to whether the statutes were to be applied retroactively or prospectively, an issue that would have to be later decided by the courts.¹⁴

D. The Rush to the Courthouse: August 29, 2006

Notwithstanding the Louisiana Supreme Court's action upholding the legislative extension of prescription on August 25, 2006, and the voluntary agreement of the insurance industry to extend the time to file suit, many insureds rushed to the courthouse in advance of August 29, 2006 to file suit. Their rush was certainly justified in a time of uncertainty; however, this grand influx of litigation—the Hurricane Litigation—created a bottleneck at the courts from which many are still trying to recover. At the two year mark, suits were still being filed.

11. LA. REV. STAT. ANN. § 22:658 (2007).

12. LA. REV. STAT. ANN. § 22:658.2 (2007).

13. *Id.*

14. 2006 La. Acts No. 12, § 1.

II. THE FIRST BATTLE: PROCEDURAL JOCKEYING

A. Removal

As is often the case in litigation, plaintiffs file suit in state court and defendants remove, whenever possible, to federal court. The same occurred in the Hurricane Litigation. In efforts to keep this from happening, insureds' counsel often got creative, naming local insurance agents and insurance adjusters as defendants, in attempts to destroy diversity jurisdiction.

1. The Retail Agents

The claim against the retail agents was typically that to the extent that the insureds did not have sufficient coverage, the insurance agent was at fault in failing to obtain the coverage. The insurance agents and the insurer defendants responded to the motions to remand with the argument that the claims against the insurance agents were time barred under Louisiana Revised Statutes section 9:5606, which provides a one year prescriptive period and a three year peremptive period to file suit. The defendants argued in many cases that the peremptive period began to run from the date the policy was first issued and did not begin anew each time the policy was renewed. For the most part, the federal judges agreed and concluded many claims against the agents were time barred, resulting in a ruling as to fraudulent joinder of these defendants and a finding of diversity jurisdiction.¹⁵

2. The Adjusters

The claims against the adjusters typically centered around the improper adjustment of the claims. The courts concluded that these claims failed, finding the acts of the insurance adjuster were on behalf of and therefore the conduct of the insurer.¹⁶ Thus, like

15. *Bates v. Allstate Ins. Co.*, No. 06-10566 (E.D. La. July 11, 2007); *La. Med. Mgmt. Corp. v. Bankers Ins. Co.*, No. 06-7248 (E.D. La. Apr. 18, 2007).

16. *Cajun Kitchen of Plaquemines, Inc. v. Scottsdale Ins. Co.*, No. 06-8939 (E.D. La. Jan. 3, 2007); *Rosinia v. Lexington Ins. Co.*, No. 06-6315 (E.D. La. Oct. 31, 2006).

the retail agents, many of these claims were dismissed and the federal court maintained jurisdiction.¹⁷

3. Jurisdiction

In several cases, insurer defendants asserted alternative theories of jurisdiction, including the Class Action Fairness Act, 28 U.S.C. § 1367 (“CAFA”) and the Multiparty, Multiforum, Trial Jurisdiction Act, 28 U.S.C. § 1369 and 28 U.S.C. § 1441(e)(1)(B) (“MMTJA”).¹⁸

The federal courts have accepted coverage under CAFA, which requires minimal diversity and an amount in controversy of \$5,000,000, exclusive of interest and costs.¹⁹ However, CAFA is limited to class actions.²⁰ Thus, for those actions not filed as class actions, insurers sought to establish jurisdiction under the MMTJA, which requires only minimal diversity between adverse parties that arises from a single accident, where at least seventy-five natural persons have died in the accident “at a discrete location.”²¹ However, the MMTJA requires a federal court to abstain from exercising jurisdiction if (1) a substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that state.²² Removal is allowed if (1) the action could have originally been brought under the MMTJA; or (2) the defendant is a party to an action which is or could have been brought under the MMTJA and arises from the same accident, even if the action to be removed could not have been

17. *Cajun Kitchen*, No. 06-8939; *Rosinia*, No. 06-6315.

18. *Craddock v. Safeco Ins. Co.*, No. 05-6365 (E.D. La. Aug. 15, 2006); *Flint v. La. Farm Bureau Mut. Ins. Co.*, No. 06-2546 (E.D. La. Aug. 15, 2006). For a thorough discussion of this issue, see Joshua A. DeCuir, *A Federal Tête-à-Tête? The Multiparty, Multiforum Trial Jurisdiction Act and Hurricane Katrina: Past, Present, and Future Considerations*, 68 LA. L. REV. 681 (2008).

19. *Craddock*, No. 05-6365; *Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364 (E.D. La. 2007); *Gaunt v. La. Citizens Prop. Ins. Corp.*, No. 06-7817 (E.D. La. June 29, 2007).

20. 28 U.S.C. § 1332(d) (2006).

21. 28 U.S.C. § 1369(a) (2006).

22. § 1369(b).

brought in a federal district court as an original matter.²³ Judge Polozola, without written reasons, concluded that jurisdiction under the MMTJA existed in *Chehardy v. State Farm Fire and Casualty Co.*²⁴ The insurers further attempted to use this finding in *Chehardy* in subsequent cases based on the piggy-back provision in 28 U.S.C. § 1441(e)(1)(B).²⁵ Outside of the levee breach litigation, jurisdiction under the MMTJA was rejected and its use in *Chehardy* as a basis of jurisdiction was called into question.²⁶

B. Class Actions

Many lawsuits were filed as class actions, including the state court cases *Oubre v. Louisiana Citizens Fair Plan*²⁷ and *Buxton v. Louisiana Citizens Fair Plan*,²⁸ and two federal suits—*Caruso v. Allstate Insurance Co.*²⁹ and *Terrebonne v. Allstate Indemnity Co.*³⁰ The defendants in these actions objected to the class filings. In *Oubre*, the fifth circuit upheld the class certification, finding that all class certification requirements had been satisfied.³¹ In contrast, the district courts in *Buxton*, *Caruso* and *Terrebonne* declined to reach the same result.³²

23. 28 U.S.C. § 1441(e)(1)(B) (2006).

24. Nos. 06-1672, 06-1673 (M.D. La. 2006). *Chehardy* was subsequently transferred to the Eastern District of Louisiana and was consolidated into *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 (E.D. La. Apr. 16, 2007), *aff'd in part, vacated in part*, 495 F.3d 191 (5th Cir. 2007).

25. See *Wallace v. La. Citizens Prop. Ins. Co.*, 444 F.3d 697, 702 (5th Cir. 2006) (stating that 1441(e)(1)(B) “established supplemental jurisdiction over the *Wallace* action, piggy-backing jurisdiction on the district court’s original jurisdiction over the pending *Chehardy* action” but did not clearly determine whether Katrina was an “accident” as envisioned by the statute).

26. *Johnson v. State Farm Fire & Cas. Co.*, No. 06-6248 (E.D. La. Nov. 28, 2006); *Flint v. La. Farm Bureau Mut. Ins. Co.*, No. 06-2546 (E.D. La. Aug. 15, 2006).

27. 961 So. 2d 504 (La. App. 5th Cir.), *writ denied*, 964 So. 2d 363 (La. 2007).

28. No. 2006-8341 (Civ. Dist. Ct. Aug. 9, 2007).

29. No. 06-2613, slip op. at 4 (E.D. La. Aug. 3, 2007).

30. No. 06-4697 (E.D. La. July 31, 2007).

31. *Oubre*, 961 So. 2d at 510.

32. *Buxton*, No. 2006-8341; *Caruso*, No. 06-2613, slip op. at 4 (citing *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05 Civ. 436, slip op. at 2 (S.D. Miss. Feb. 23, 2006)); *Terrebonne*, No. 06-4697.

III. THE SUBSTANTIVE RULINGS

When the wave finally subsided on the jurisdictional issues, the parties naturally began to focus on the key substantive issues. Three key substantive issues have thus far been considered in Louisiana courts, all with differing results: (1) the application of the water exclusion; (2) the application of Louisiana's Valued Policy Law; and (3) the application of the new or old version to Louisiana's statutes for bad faith penalties. Other important issues have yet to be addressed, including business interruption insurance.

A. The Water Exclusion

Almost immediately after Hurricane Katrina, some began to question whether property policies, which typically cover fire and wind and exclude "water," covered water damage caused by a hurricane event, particularly where flooding was arguably caused by human fault.

Gladys Chehardy's suit against Louisiana Insurance Commissioner Robert J. Wooley was one of the first suits filed on the issue, having been filed in September of 2005.³³ In *Chehardy*, a class of plaintiffs filed suit against most of the property insurers in Louisiana, as well as then-insurance commissioner, Robert Wooley. The plaintiffs claimed that the standard water exclusion found in such property policies does not exclude water damage due to flooding caused by breaches in the levee system that occurred because of human negligence in design, construction, and maintenance. In addition to these allegations, the class plaintiffs sought a writ of mandamus to have Wooley similarly interpret these provisions as suggested in the petition.

The *Chehardy* suit was by no means unique. Several other petitions were filed on similar issues, including *Vanderbrook v. Unitrin Preferred Insurance Co.*, *Xavier University of Louisiana v. Travelers Property Casualty Co. of America*, and *Humphreys v. Encompass Indemnity Co.*, among others, which were consolidated

33. *Chehardy v. State Farm Fire & Cas. Co.*, Nos. 06-1672, 06-1673 (M.D. La. 2006).

in the United States District Court in New Orleans as *In re Katrina Canal Breaches Consolidated Litigation* (“*Katrina Breaches*”).³⁴

In a much publicized opinion, Judge Stanwood Duval ruled that many of the water exclusions found in all-risk policies are ambiguous in the context of flooding due to human fault, thereby rendering them unenforceable if such damages were ultimately proven.³⁵ In *Katrina Breaches*, the court considered motions for judgment on the pleadings and motions to dismiss filed by several insurers issuing homeowners’ policies based on water exclusions in the policies. The plaintiffs in each of the consolidated cases alleged that the negligence of government entities responsible for design, construction, and maintenance of levees and floodwalls contributed to the breaches, resulting in the flooding of their properties. The plaintiffs contend the water exclusions in the all-risk policies are ambiguous because they do not specify whether coverage is excluded for loss due to water caused by human negligence or whether it applies only to naturally occurring flooding.

The district court denied all but two of the insurers’ motions to dismiss. As to the two insurers against whom claims were dismissed, one insurer’s policy made clear that the water exclusion applies to flood regardless of how it is caused, while the other policy expressly excluded loss caused by failure of “levees.”³⁶ Addressing the language of the other policies, the court started from the principle that all-risk policies extend to all risks of physical loss, except where expressly excluded.³⁷ The court then considered cases addressing exclusions for collapse and earth movement and cases refusing to apply water exclusions to pipe and water hydrant bursts, and held that for water damage due to

34. More than forty cases were consolidated for pretrial purposes in the Eastern District of Louisiana. See *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729 (E.D. La. 2006), *aff’d in part, vacated in part*, 495 F.3d 191 (5th Cir. 2007). This article does not attempt to address the other issues involved in the *Katrina Breaches* litigation, including the claims against the U.S. Army Corps of Engineers. See *id.*

35. *Id.* at 772. The court, however, upheld exclusions for damage “no matter the cause.” *Id.* at 775.

36. *Id.* at 763–64, 774.

37. *Id.* at 737.

negligence to be excluded, such damage must be unambiguously identified in the exclusion.³⁸ The opinion devotes much discussion to the meaning of “flood,” which is included in the definition of “water damage” in most property policies, as opposed to the broader definition of “water damage.”³⁹ In considering the meaning of “flood,” the opinion notes that the policies do not specifically define “flood” and that the term “flood” is susceptible to two reasonable constructions: man-made floods and natural floods. The court concluded that the term “flood” is ambiguous as it is susceptible to different constructions and not reasonably limited to natural occurrences, and that the ambiguity would be construed against the insurers.⁴⁰ The court certified its decision for immediate appeal to the Fifth Circuit Court of Appeals.⁴¹

Judge Medley, in *Historic Restoration, Inc. v. RSUI Indemnity Co.*, went one step further. Judge Medley followed Duval’s reasoning and concluded the water exclusion was ambiguous; however, he also ruled the flooding in New Orleans was caused by human fault and thus was covered under the policy.⁴²

On appeal, the Fifth Circuit overturned Judge Duval’s rulings in the *Katrina Breaches* litigation that the provisions were ambiguous.⁴³ Specifically, the Fifth Circuit concluded:

In light of these definitions, we conclude that the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term “flood.” When a body of water overflows its normal boundaries and inundates an area of land that is normally dry, the event is a flood. This is precisely what occurred in New Orleans in the aftermath of Hurricane Katrina. Three watercourses—the 17th Street, Industrial and London Avenue Canals—overflowed their

38. *Id.* at 756–60.

39. *Id.* at 747–56.

40. *Id.* at 757.

41. *Id.* at 780–81.

42. *Historic Restoration, Inc. v. RSUI Indem. Co.*, No. 2006-4990 (Civ. Dist. Ct. Dec. 5, 2006), *aff’d*, 955 So. 2d 200 (La. App. 4th Cir. 2007), *writ denied*, 959 So. 2d 497 (La. 2007).

43. *In re Katrina Canal Breaches Consol. Litig.*, 495 F.3d 191, 221 (5th Cir. 2007).

normal channels, and the levees built alongside the canals to hold back their floodwaters failed to do so. As a result, an enormous volume of water inundated the city. In common parlance, this event is known as a flood.

....

Even if we accept the plaintiffs' characterization of the flood in this case as non-natural, we disagree that the term "flood" in this context is limited to natural events. The plaintiffs first maintain that dictionary definitions support their interpretation, but the dictionaries we have reviewed make no distinction between floods with natural causes and those with non-natural causes. Indeed, the Columbia Encyclopedia specifically states that a flood may result from the bursting of a levee. Similarly, Appleman's treatise states: "A 'flood,' contemplated by the exclusion, can result from either natural or artificial causes."

....

In sum, we conclude that the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. In the midst of a hurricane, three canals running through the City of New Orleans overflowed their normal boundaries. The flood-control measures, i.e., levees, that man had put in place to prevent the canal's floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.⁴⁴

44. *Id.* at 214–15, 221 (citations omitted). *See also* Axis Reinsurance Co. v. Lanza, No. 05-6318, slip op. at 1, 3 (E.D. La. Mar. 29, 2007) (relying on the district court *Katrina Breaches* opinion to hold that exclusion for "damage due to . . . hurricane" in a policy providing coverage for damage to a watercraft does not exclude coverage for a loss when the watercraft sank in water from a levee failure, assuming the levee was negligently designed or maintained).

Notwithstanding the Fifth Circuit ruling, at least one state appellate court has cast doubt on the Fifth Circuit's interpretation of this issue. In *Sher v. Lafayette Insurance Co.*, the Louisiana fourth circuit issued an opinion that can only be described as confusing.⁴⁵ At first glance, the ruling appears to follow the Duval analysis (albeit without reference to it), finding the water exclusion ambiguous in the context of man made negligence.⁴⁶ However, a closer reading of the ruling reveals only two of the judges expressly signed off on this portion of the ruling, with one issuing a formal dissent finding the water exclusion unambiguous and fully enforceable.⁴⁷

B. The Valued Policy Law

Prior to Hurricane Katrina, Louisiana's Valued Policy Law ("VPL"), found at Louisiana Revised Statutes section 22:695, received little attention. Although there were certainly cases interpreting it,⁴⁸ the decisions concerning the VPL received little fanfare. After Katrina and Rita, the VPL began to receive a lot of attention due to attorneys' efforts to recover full policy limits for their clients, even when only a portion of an insured loss was due to a covered peril.

The allure of the VPL is that it provides for the full recovery of the policy's limits in the event of a "total loss." Specifically, the statute provides:

A. Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs

45. 2007-CA-0757, 2007 WL 4247708 (La. App. 4th Cir. Nov. 19, 2001).

46. *Id.* at *5.

47. *Id.* at *23 (Cannizzaro, J., concurring in part, dissenting in part).

48. *Real Asset Mgmt., Inc. v. Lloyd's of London*, 61 F.3d 1223, 1228 (5th Cir. 1995); *Scottsdale Ins. Co. v. Wasserman*, No. 97-1803, slip op. at 2 (E.D. La. Nov. 17, 1997); *Grice v. Aetna Cas. & Sur. Co.*, 359 So. 2d 1288 (La. 1978); *LaHaye v. Allstate Ins. Co.*, 570 So. 2d 460, 464 (La. App. 3d Cir. 1990);

during the term of the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefor, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal fault on the part of the insured or the assigns of the insured.⁴⁹

In *Chauvin v. State Farm Fire & Cas. Co.*, the insured plaintiffs filed suit against various insurers claiming that the VPL mandates that insureds be allowed to recover the full policy limits in the event of a total loss.⁵⁰ The insurer defendants responded with a motion to dismiss in the United States District Court for the Eastern District of Louisiana, asserting that (1) the VPL applies only to a total loss resulting from fire; and (2) even if the VPL extends to perils other than fire, the VPL does not allow full recovery when the total loss is not caused by a covered peril.⁵¹ In response, the insureds argued that the VPL does apply to non-fire perils and that the VPL requires an insurer to pay the agreed face value when (1) the property is rendered a “total loss,” even if the “total loss” is due to an excluded peril; so long as (2) a covered peril causes some damage, no matter how small, to the property. Without deciding that the VPL applied to non-fire perils, the district court first held that, regardless of whether the statutory language of the VPL is considered ambiguous, the homeowners’ interpretation would lead to absurd consequences.⁵²

Judge Vance heard the motions and concluded that the focus of the VPL was on establishing the value of the property in the event of a total loss and was not intended to expand coverage to excluded perils. Thus, the court determined that the VPL does not apply when a total loss does not result from a covered peril.⁵³ Because the court ruled the VPL was not triggered on this basis, the district

49. LA. REV. STAT. ANN. § 22:695 (2007) (emphasis added).

50. 450 F. Supp. 2d 660, 661–62 (E.D. La. 2006), *aff’d*, 495 F.3d 232 (5th Cir. 2007).

51. *Id.* at 662.

52. *Id.* at 664, 666.

53. *Id.* at 667.

court did not touch on the other issues. However, in a subsequent ruling in another case, Judge Vance ruled that the VPL applies to all policies that provide fire coverage and not “fire only” policies and, more importantly, the VPL may apply to a loss under such a multi-peril policy due to a peril other than fire, including wind.⁵⁴

On August 6, 2007, the Fifth Circuit upheld the district court’s ruling in *Chauvin* on the application of the VPL.⁵⁵ Specifically, the *Chauvin* opinion issued by the Fifth Circuit states:

We agree with the district court that the language of the VPL is not clear and unambiguous. In particular, the critical language in the statute providing that “in the case of a total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property” is susceptible of two possible meanings: (1) in the event of a total loss, an insurer is required to pay the homeowner the agreed full value of a policy as long as a covered loss causes some damage to the property, even if a non-covered peril renders the property a total loss; or (2) an insurer is only required to pay the homeowner the agreed face value of a policy when the property is rendered a total loss by a covered loss. We therefore must interpret the statute in a manner that best conforms to the purpose of the law.

....

In other words, according to the Louisiana courts, the VPL was adopted for two main purposes: (1) to keep insurers from writing insurance on property for more than it was actually worth, collecting premiums based on that overvaluation, and later arguing that the property was worth less than the face value when the property was destroyed; and (2) to discourage intentional destruction of property by insureds when they are permitted to over insure their property.

54. *Turk v. La. Citizens Prop. Ins. Corp.*, No. 06-144 (W.D. La. June 7, 2006).

55. *Chauvin v. State Farm Fire & Cas. Co.*, 495 F.3d 232, 238 (5th Cir. 2007). The insureds requested that the issue be certified to the Louisiana Supreme Court, a request the Fifth Circuit denied. *Id.* at 237.

....

After considering the purposes of the VPL, we are convinced that the insurers' construction of the VPL best conforms with its legislative purpose and thus, the VPL only requires an insurer to pay the agreed face value of the insured property if the property is rendered a total loss from a covered peril.

As the district court observed, the homeowners' interpretation does nothing to further the purpose of the VPL. In particular, a finding that the statute requires insurers to pay the agreed face value of the property, even if an excluded peril (flooding) causes the total loss, runs counter to the VPL's effort to link insurance recoveries to premiums paid. Such an interpretation of the statute would force the insurer to pay for damage resulting from a non-covered peril for which it did not charge a premium. Also, because the focus of the VPL is on valuation (to set the *amount* payable when there is a total loss), not on coverage, the statute signals no intent to expand coverage to excluded perils.⁵⁶

The results in the state court system are yet fully unknown. At the district court level, the state courts that have considered the issue have uniformly rejected the federal analysis.⁵⁷ However, the Louisiana third circuit has ruled in a 3-2 opinion in favor of the defendant insurance companies, generally following the Fifth Circuit's analysis in *Chauvin*.⁵⁸ The third circuit in *Landry v. Louisiana Citizens Property Insurance Corp.*, distinguished its reasoning, concluding that an insured may recover the policy limits in the event a covered peril causes the property to be a "total loss,"⁵⁹ regardless of whether other causes, like flood, contribute to

56. *Id.* at 238–40 (footnotes omitted).

57. *Landry v. La. Citizens Prop. Ins. Corp.*, No. 85571-D (15th Jud. Dist. Ct. Jan. 4), *rev'd in part*, 964 So. 2d 463 (La. App. 3d Cir. 2007); *Langston v. La. Citizens Prop. Ins. Corp.*, No. 53-219 (25th Jud. Dist. Ct., Div. B Feb. 9, 2007).

58. *Landry v. La. Citizens Prop. Ins. Corp.*, 964 So. 2d 463, 473 (La. App. 3d Cir. 2007).

59. Under Louisiana law, a constructive total loss occurs when the cost to repair the property exceeds the property's value. *Real Asset Mgmt., Inc. v.*

the loss, thereby adopting the “efficient proximate cause” approach to causation.⁶⁰ In other words, the third circuit takes the view that the flood damage should be excluded entirely from the analysis, with the loss due to wind considered a total loss and implicating the VPL only when the wind damage alone results in damage that exceeds the value of the insured property. A similar appeal is pending at the fourth circuit.⁶¹

Several issues related to the VPL have not yet been addressed, including the impact of flood payments when the VPL is triggered and the issues surrounding the insurers’ attempts to opt out of the VPL. Were the current rulings to stand, these issues may never be determined in the courts, at least not in the context of the Hurricane Litigation, inasmuch as the overwhelming majority of alleged VPL cases would not, in fact, trigger the VPL at all if its application were determined solely on the basis of wind damage.

C. Business Interruption Insurance

The loss of business associated with Hurricanes Katrina and Rita is comparable to that related to the events of 9/11, which led to a flurry of litigation and a fairly well defined body of law on the issues related to business interruption insurance, i.e., insurance for business enterprises that protects from loss of income due to damage caused by covered events.⁶² On its most basic level, the

Lloyd’s of London, 61 F.3d 1223, 1229 (5th Cir. 1995); *Dumond v. Mobile Ins. Co.*, 309 So. 2d 776, 778 (La. App. 3d Cir. 1975).

60. *Landry*, 964 So. 2d at 479.

61. *Historic Restoration, Inc. v. RSUI Indem. Co.*, 955 So. 2d 200 (La. App. 4th Cir.), *writ denied*, 959 So. 2d 497 (La. 2007).

62. *See Duane Reed, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2005); *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158 (2d Cir. 2005); *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613 (8th Cir. 2005); *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 440 (S.D.N.Y. 2005) (holding that a lessee of property may recover for loss of business income only for that period of time it would take to secure alternative property where it had no control over the repairs to the property); *Streamline Capital, LLC v. Hartford Cas. Ins. Co.*, No. 02 Civ. 8123 (NRB), slip op. at 8 (S.D.N.Y. Aug. 25, 2003) (holding that the period of restoration cannot be tied to the rebuilding of property over which neither the insured nor the insurer have any control).

key legal issues for such coverage are typically: (1) whether the coverage is triggered by a covered event; and (2) the period of recovery for such coverage.

However, unlike the 9/11 litigation, we have not yet seen a body of law develop in Louisiana. To date, there are only a few decisions, all of which pre-date August 29, 2005, related to this issue. And while the 9/11 litigation is helpful with respect to the issues here, Louisiana, and New Orleans in particular, has the complicating factor of loss of income due to multiple causes, including flood, wind, mandatory evacuation, loss of resident base, loss of market, and loss of utilities.

In *Urrate v. Argonaut Great Central Insurance Co.*, the Louisiana Court of Appeal for the Fifth Circuit determined that an insurer owed a certain percentage of a business loss claim where the insured's business was damaged by wind and water.⁶³ The property insurer's adjuster determined that most of the damage was caused by flood, but that the property also suffered wind damage.⁶⁴ The policy provided property and business loss coverage. The fifth circuit affirmed, noting that a large part of the back of the building was gone including the window wall; other windows were broken; and the roof was damaged and partly blown back over itself by wind force.⁶⁵ The appellate court noted that although it might not have been the factual finding it would have made, it could not say that based on the record the finding was clearly wrong or manifestly erroneous.⁶⁶ It is unclear how the court determined what percentage of business loss was caused by wind.⁶⁷

63. 881 So. 2d 787, 791 (La. App. 5th Cir. 2004); *see also* Levitz Furniture Corp. v. Houston Cas. Co., No. 96-1790, slip op. at 3 (E.D. La. Apr. 28, 1997) (insured entitled to recover projected profits based on increased consumer demand following flood from which the insured would have been able to benefit had it been open for business).

64. 881 So. 2d at 789.

65. *Id.* at 790-91.

66. *Id.* at 791.

67. *See also* Simkins Indus., Inc. v. Lexington Ins. Co., 401 A.2d 181, 191 (Md. App. 1979) (where uncovered flood and covered ensuing accident both could have contributed to business interruption of insured plant, the jury was entitled to consider the extent of the business loss caused by the covered accident); *cf.* St. Joseph Light & Power Co. v. Zurich Ins., 698 F.2d 1351, 1358 (8th Cir. 1983) (insured incurred extra expense due to fire (covered) and low-

In *CII Carbon, L.L.C. v. National Union Fire Insurance Co.*, the fourth circuit considered a business income claim of its insured who relied on the Kaiser aluminum plant to purchase its product.⁶⁸ In *CII Carbon*, the insured had contingent business income coverage, i.e., coverage for damage to businesses upon which its operations relied.⁶⁹ The insured unquestionably relied on the Kaiser plant to purchase its product. The Kaiser plant had an explosion and the period necessary to rebuild it was lengthy. The insurer sought to limit the period of restoration to the period before the insured could begin obtaining its product from another source. The court disagreed, ruling the period of restoration for the contingent business income claim was the length of time it would take to re-build the Kaiser plant. Notably, this decision is contrary to that found in the 9/11 litigation.⁷⁰

D. The Off-Set Cases and the Louisiana Road Home

Many insureds suing their property insurers were also insured under flood policies. With New Orleans receiving wind and flood damage, many of these insureds recovered under multiple policies, raising the issue of duplicative payments. In the federal system, the district courts have declined to allow an insured to recover duplicative damages; however, they have not prevented an insured who recovered under a flood policy from also recovering under a

water overheating condition of a boiler (not covered); court limited insured's extra expense coverage to those amounts "solely" attributable to covered damage).

68. 918 So. 2d 1060, 1062 (La. App. 4th Cir. 2005), *writ denied*, 925 So. 2d 1235 (La. 2006). *Cf. Duane Read*, 411 F.3d at 398 (involving a BI claim arising out of 9/11, in which the court followed a very narrow construction of period of recovery for loss of the WTC site, limiting the period of recovery to that in which the insured could obtain an alternate site reasonably equivalent of the former WTC site); *Lava Trading*, 365 F. Supp. 2d at 442 (following *Duane Read* to limit the BI claim to that period in which the insured could move into a replacement office).

69. 918 So. 2d 1060.

70. *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, No. 01 Civ. 11200 (JSR), slip op. at 3 (S.D.N.Y. May 11, 2006).

wind policy.⁷¹ Rather the recovery under both policies has been limited to the pre-storm value of the insured property.

As part of the recovery effort, the State of Louisiana developed and implemented The Road Home Program. The Attorney General's office alleges the Road Home Program was developed to provide funding to assist recipients in offsetting their uninsured losses and foster their efforts to rebuild their residences, lives, and the communities where they live.⁷² The State Attorney General has filed suit against the insurance industry to recover sums allegedly owed to insureds via subrogation agreements with the insureds, executed as a condition of recovery under the Program.⁷³ In other words, the State is seeking to recoup the funds paid out through The Road Home Program. The State seeks recovery under the policy terms, including seeking to nullify the water exclusion, under the VPL, and for statutory bad faith penalties.⁷⁴

E. The Bad Faith Verdicts

The most plentiful verdicts have come in the bad faith arena. The juries and judges hearing these cases—in state and federal court—are almost all punishing the insurance industry.

71. *Broussard v. State Farm Fire & Cas. Co.*, No. 06-8084, slip op. at 4 (E.D. La. Aug. 2, 2007) (holding that insured is limited to the uncompensated loss up to the homeowner policy limits); *Ferguson v. State Farm Ins. Co.*, No. 06-3936, slip op. at 3 (E.D. La. May 9, 2007) (holding that insured not estopped from recovering against flood and wind carrier but loss will be reduced by the amount of the flood payments, with the maximum recovery under both policies being the pre-storm value of the property); *Esposito v. Allstate Ins. Co.*, No. 06-1837, slip op. at 2 (E.D. La. Apr. 16, 2007); *Weiss v. Allstate Ins. Co.*, No. 06-3774, slip op. at 3 (E.D. La. Mar. 21, 2007) (holding that no policy provision prevents plaintiffs from recovering for previously uncompensated, covered damage, without reference to the amount received under their flood policy, so long as the combined recovery does not exceed the value of their property).

72. *State v. AAA Ins. Co.*, No. 2007-08970 (Civ. Dist. Ct. filed Aug. 23, 2007).

73. *Id.*

74. *Id.*

1. The Language of the Statutes

There are two key statutes, Louisiana Revised Statutes sections 22:658 and 22:1220. The key provisions of the old version of section 22:658 are:

B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor . . . when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of twenty-five percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured . . . or in the event of a partial payment or tender has been made, twenty-five percent of the difference between the amount paid or tendered and the amount found to be due.⁷⁵

The current version of R.S. 22:658 is identical to the old version, with the exception that 25% is changed to 50% and “reasonable attorneys fees and costs” are now recoverable. Louisiana Revised Statutes section 22:1220 has not been amended, with the exception that it now allows recovery for failure to abide by section 22:658.2. The key provisions of section 1220 are:

C. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. . . .⁷⁶

2. The Issue of Retroactivity

Several judges have had occasion to consider the issue of retroactivity of the amended versions of these provisions. The federal judges have universally concluded that the old version of the statute applies so long as the cause of action arose before

75. LA. REV. STAT. ANN. § 22:658 (2007) (amended by 2006 La. Acts No. 813, § 1).

76. LA. REV. STAT. ANN. § 22:1220 (2007).

August 15, 2006.⁷⁷ In the state court system, one trial judge has allowed the recovery under the new version of the statute, where suit was filed after August 15, 2006, even though the alleged breach occurred before the effective date.⁷⁸ This portion of the ruling, however, was reversed on appeal at the Louisiana fourth circuit, thereby following the rationale of the federal district courts that the version of the statute applies when the cause of action accrues.⁷⁹ The state district court opinions are not reported, but it is rumored that many district judges in Orleans Parish have followed the new version of section 658. In *Best v. State Farm Fire and Casualty Co.*, the fourth circuit agreed with the federal district courts that the old version applies where the claim for bad faith arose before the effective date of the amendments, leaving open the possibility of application of the new version where the claim does not arise until after August 15, 2006.⁸⁰ However, the continued failure to pay after this date is not enough to trigger the new version.

Nevertheless, where the cause of action does not accrue until after August 15, 2006, the insured may recover under the new version of the statute as interpreted by some at the district court level.⁸¹ Thus, at least as interpreted by the federal district courts, whether the new or old version of 658 applies depends largely on whether the insured characterizes the claim as having arisen before or after August 15, 2006.

77. *Broussard v. State Farm Fire & Cas. Co.*, No. 06-8084, slip op. at 7-8 (E.D. La. Aug. 2, 2007); *Cazeau v. Allstate Ins. Co.*, No. 06-3802, slip op. at 2 (E.D. La. July 26, 2007); *Leali v. Certain Underwriters at Lloyd's, London*, No. 06-5030 (E.D. La. July 3, 2007); *Weiss v. Allstate Ins. Co.*, No. 06-3774, slip op. at 2 (E.D. La. Mar. 21, 2007); *cf. Gore v. Fid. & Deposit Co. of Md.*, No. 06-cv-2054, slip op. at 3 (W.D. La. June 6, 2007) (for purposes of a motion to remand, the judge assumed the new version of the statute applied in determining whether the amount in controversy was satisfied).

78. *Sher v. Lafayette Ins. Co.*, No. 2006-9276 (Civ. Dist. Ct. Mar. 26, 2007).

79. *Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757, 2007 WL 4247708 (La. App. 4th Cir. Nov. 19, 2001).

80. No. 2007-0573, 2007 WL 3015571 (La. App. 4th Cir. Oct. 10, 2007).

81. *Conlee v. Fireman's Fund Ins. Co.*, No. 07-660, slip op. at 3 (E.D. La. July 17, 2007) (new version applied where no payment was made before effective date of amendments).

3. *The Damages Awarded Under the Statutes*

In *Weiss v. Allstate Insurance Co.*, the jury awarded a substantial amount of damages for mental anguish to insured homeowners under Louisiana Revised Statutes section 22:1220.⁸² In *Tomlinson v. Allstate Indemnity Co.*, the insurer moved for partial summary judgment on certain of the insured's claims, including the insured's assertion of a claim for pain and suffering and negligent infliction of emotional distress.⁸³ Judge Feldman dismissed these claims, noting that the insured preserved a claim under section 22:1220.⁸⁴ Judge Feldman did not make a statement as to whether damages for mental anguish could be awarded under this provision.

In *Shadow Lake Management Co. v. Landmark American Insurance Co.*, a federal judge held that statutory bad faith penalties for an untimely response to a first-party claim apply to the entire amount ultimately found due under the policy even though the payments triggering bad faith were for payment of only undisputed amounts.⁸⁵ The insured sued its insurer alleging that the insurer was aware that there was an undisputed portion of the claim owed yet failed to pay the claim within the statutory deadlines.⁸⁶ The insured sought summary judgment that this late payment was, as a matter of law, statutory bad faith entitling the insured to penalties.⁸⁷ The district court held that the failure to pay the claim within the statutory deadlines would be considered bad faith without evidence of arbitrary and capricious conduct, exposing the insurer to penalties based on the undisputed sum.⁸⁸ However, a fact issue remained as to the time the insurer was obligated to pay on the loss, and the court concluded it must deny the insured's motion.⁸⁹ The court went on to hold, however, that if

82. No. 06-3774, slip op. at 8. *See also* *Dickerson v. Lexington Ins. Co.*, No. 06-8056 (E.D. La. Sept. 7, 2007).

83. No. 06-0617, slip op. at 1 (E.D. La. Jan. 31, 2007).

84. *Id.* at 2.

85. Nos. 06-4357, 06-4358, 06-4359, 06-4360, 06-4428, slip op. at 5 (E.D. La. July 2, 2007).

86. *Id.* at 1.

87. *Id.*

88. *Id.* at 3-4.

89. *Id.* at 5.

the insurer were found in bad faith for failure to timely pay the undisputed sums and was also ultimately found liable for additional sums under the policy beyond the undisputed amount, the insurer would be liable for penalties on that additional amount as well regardless of whether there were evidence of bad faith as to that additional amount.⁹⁰ Recovery under 1220 was limited to 100% of the entire claim.⁹¹

IV. A COMPARISON TO MISSISSIPPI

Mississippi has not seen the amount of litigation found in Louisiana. However, a comparison of the rulings is interesting. The key rulings thus far in Mississippi have been: (1) the water exclusion is unambiguous and enforceable;⁹² (2) the anti-concurrent causation wording is unambiguous and enforceable in certain situations in the context of Hurricane Katrina claims;⁹³ and (3) the insured's recovery may be limited by payments received from other insurers.⁹⁴

In *Leonard v. Nationwide Mutual Insurance Co.*, the insureds had purchased a homeowner's policy through a local agent of the insurer's.⁹⁵ The policy provided coverage for damage caused by windstorm but excluded coverage for damage caused by water, defined to include: "flood, surface water, waves, tidal waves, overflow of a body of water, and spray from any of these, whether driven by wind or not."⁹⁶ The insureds' home sustained wind damage, and was also inundated by storm surge to the depth of approximately five feet.⁹⁷ The insureds did not have flood insurance. Following an inspection of the insureds' property, the insurer made an estimate of the wind damage and tendered

90. *Id.*

91. *Id.*

92. *Leonard v. Nationwide Mut. Ins. Co.*, 438 F. Supp. 2d 684, 695 (S.D. Miss. 2006), *aff'd*, 499 F.3d 419 (5th Cir. 2007).

93. *Tuepker v. State Farm Fire & Cas. Co.*, No. 06-61075, 2007 WL 3256829 (5th Cir. Nov. 6, 2007).

94. *Tejedor v. State Farm Fire & Cas. Co.*, No. CIV11:05CV679LTS-RHW, slip op. (S.D. Miss. Nov. 6, 2006).

95. 438 F. Supp. 2d at 687.

96. *Id.* at 689.

97. *Id.*

payment to the insureds.⁹⁸ The insureds asserted that all of the damage resulting from the hurricane was covered under the policy on the basis that the insurer's agent had informed them that purchasing flood insurance was not necessary. The court held that the provisions of the policy excluding coverage for damage caused by water are valid and enforceable, stating "[t]o the extent property is damaged by wind, and is thereafter also damaged by water, the insured can recover that portion of the loss which he can prove to have been caused by the wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water."⁹⁹ While noting that the insurer was not relying upon the anti-concurrent causation language contained in a "weather conditions" exclusion to deny coverage, the court also noted that to the extent the anti-concurrent causation wording would bar coverage for windstorm damage (a covered loss) when that damage "occurred at approximately the same time" as an excluded peril, e.g., water, then such wording is ambiguous and not enforceable under Mississippi law.¹⁰⁰ The court's comment is consistent with other post-Katrina rulings in which it criticizes reliance on the anti-concurrent causation wording in the defense of a hurricane claim.

The court then addressed the insureds' claim that the policy afforded coverage for all damage that resulted from the hurricane (wind and water) based on the representations of the insurer's agent. The court found that, based on the evidence presented at trial, it was apparent that the insureds had asked the agent whether it would be advisable to purchase flood insurance and that the agent offered his opinion that it was not necessary.¹⁰¹ The court found that the agent did not materially misrepresent the terms of the policy and that he did not make any statement which could be reasonably understood to alter the terms of the policy. To the extent that the insured may have inferred that the policy would afford coverage for water damage, the court found that such an

98. *Id.* at 689-90.

99. *Id.* at 695.

100. *Id.* at 694.

101. *Id.* at 690.

inference was “erroneous” and “inconsistent with the policy exclusion for water damage.”¹⁰²

In *Tuepker v. State Farm Fire and Casualty Co.*, the Fifth Circuit reversed a ruling from the Southern District of Mississippi that anti-concurrent language is ambiguous and unenforceable in the context of hurricane claims.¹⁰³ At the district court level, Judge Senter denied a motion to dismiss filed by State Farm based on the anti-concurrent language contained in the policy. In its order on that motion, the district court ruled favorably for State Farm that the flood exclusion in its policy applied to damage caused by storm surge but ruled that the State Farm policy’s anti-concurrent causation clause was ambiguous and did not apply to bar coverage for the insured’s claim.¹⁰⁴

The Fifth Circuit, consistent with the *Leonard v. Nationwide*¹⁰⁵ decision, first maintained the enforceability of the flood exclusion, noting the exclusion is clear and unambiguous and, further, that it applies to damage caused by storm surge. The Fifth Circuit reversed the finding of the district court that the anti-concurrent causation language is ambiguous. Specifically, the court stated, “any damage caused exclusively by a nonexcluded peril or event such as wind, not concurrently or sequentially with water damage, is covered by the policy, while all damage caused by water or by wind acting concurrently or sequentially with water, is excluded.”¹⁰⁶ The court thus found that “the ACC Clause in combination with the Water Damage Exclusion clearly provides that indivisible damage caused by both excluded perils and covered perils or other causes is not covered.”¹⁰⁷ The impact of the ruling is not as clear cut as this language would indicate, however, because the court then stated the ACC Clause applies only to “any loss which would not have occurred in the absence of one or more of the following excluded events.”¹⁰⁸ This language, the court found, would not bar coverage for a loss to a roof blown

102. *Id.* at 692.

103. No. 06-61075, 2007 WL 3256829 (5th Cir. Nov. 6, 2007).

104. *Id.* at *2.

105. 438 F. Supp. 2d at 687.

106. *Tuepker*, 2007 WL 3256829, at *6.

107. *Id.*

108. *Id.*

off by wind where subsequent storm surge later completely destroys the structure because the roof damage, when it occurred, occurred in the absence of any listed excluded peril. In so ruling, the Fifth Circuit confirmed that the application of the ACC clause is not an undue derogation of Mississippi's common law efficient proximate cause rule.

In *Tejedor v. State Farm Fire and Casualty Co.*, the court ruled that the insured could not recover twice for the same damage from multiple insurers.¹⁰⁹ The homeowner sued its windstorm insurer, which sought dismissal of the claim for extra-contractual and punitive damages. The court reserved ruling on the motion, but stated that it would use the occasion to rule that the actual loss is the maximum recovery from all applicable policies.¹¹⁰ The court noted that it is a basic proposition that "[i]nsurance law is based on the principle of indemnification and is aimed at reimbursement. The benefit derived from insurance should be no greater in value than the loss.' These well-established principles of indemnity and insurable interests apply to all insurance claims under policies that are not 'valued policies.'"¹¹¹

The property was appraised at a pre-loss value between \$280,000 to \$285,000.¹¹² The homeowner collected \$200,000 from its flood insurer.¹¹³ Thus, the court ruled that "his maximum loss is measured by the difference between the pre-storm value and the insurance benefits he has collected to compensate him for the loss of his dwelling, i.e., \$80,000–85,000."¹¹⁴ The court also held that the same principles would apply to a claim for payment on personal property.¹¹⁵

V. CONCLUSIONS

As is evident, there have been a substantial number of rulings on the insurance issues thus far, and more are to be expected. In

109. No. CIV1:05CV679LTS-RHW, slip op. (S.D. Miss. Nov. 6, 2006).

110. *Id.* at 2.

111. *Id.* (quoting *Estate of Murrell v. Quin*, 454 So. 2d 437, 444 (Miss. 1984) (Prather, J., dissenting)).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

two years, our courts have accomplished quite a bit, and their progress will hopefully allow insureds and insurers alike to resolve remaining claims within the bounds of these rulings.

It became evident while writing this article that it is virtually impossible to cover every issue litigated thus far. However, the author hopes to have achieved the goal of outlining the key issues involved and the results obtained at year end 2007.

